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IN THE

Supreme Court of the United States

October Term, 1960
No. 530

MILTON MENDE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing After Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Milton Mende, and respectfully petitions this Court to reconsider its order denying his petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit, and shows:

Opinion Below.

The opinion of the Court of Appeals is reported at 282 F. 2d 881. A copy of said opinion is printed in the Appendix A annexed to this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 26, 1960. Petition for rehearing was denied on October 25, 1960. Petition for writ of certiorari was filed on November 15, 1960, and was denied by the Supreme Court of the United States on January 9, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Whether 18 U. S. C. 3288, which permits a reindictment during the subsequent term of Court following the dismissal of an indictment that is found defective after the Statute of Limitations has run, permits a second reindictment in the subsequent term.

Statutes Involved.

Title 18 U. S. C. 3288 provides:

> "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned no later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations." (Emphasis supplied.)

Title 18, United States Code, Section 3282 provides:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Statement.

The petitioner was heretofore convicted on nine counts of using the mails in furtherance of a scheme to obtain money or property by means of false or fraudulent representations in violation of Title 18 United States Code, Section 1341. These counts were included in the third indictment returned on November 19, 1958, in this matter and involved acts alleged to have occurred between May 5, 1953, and August 14, 1953, inclusive.

Petitioner was first indicted with regard to mail fraud on April 9, 1958. On July 15, 1958, the first indictment was dismissed for failure to state a cause of action as to the counts upon which conviction was had. A second indictment charging the same acts charged in the dismissed counts in the first indictment was returned on November 5, 1958, during the next succeeding term of court. This second indictment, hereinafter referred to as the "first reindictment" was dismissed on November 19, 1958, for failure to set forth a cause of action. On the same day, November 19, 1958, a third indictment, hereinafter referred to as the "second reindict

ment" was returned by the grand jury recharging the matters set forth in the dismissed counts of the first indictment and the dismissed counts of the first reindictment.

More than five years after the acts and the commencement of the government investigation, the petitioner was put to trial on the valid counts set forth in all three indictments but was convicted only upon those counts set forth in the third indictment which counts were those which had been dismissed for failure to state a cause of action in the original indictment filed April 9, 1958, and the first reindictment filed November 5, 1958.

The statute of limitations, 18 United States Code, 3282, would have barred the various counts upon which petitioner stands convicted commencing with the earliest count on May 5, 1953, and on the latest count on August 14, 1953.

Argument.

Counsel for petitioner feels remiss in not having called to the attention of this court the fact that to permit the decision of the Court of Appeals to stand will be to punish a defendant for the diligence of his counsel in calling defective indictments to the attention of the Trial Court. Conversely, it will reward dilatory tactics.

Had petitioner's counsel delayed his attack on the first reindictment until the time of trial or raised it for the first time on appeal, then a full term of court would have intervened between the time the original indictment was dismissed and the first reindictment was found defective. Under the decision of the Court

of Appeals, and pursuant to the argument made by the Solicitor General in his brief in opposition to certiorari (Opposition Brief, 5-6), it would appear that 18 United States Code, 3288, *supra*, would not extend the period of grace to a second reindictment. If this be true, then petitioner has been penalized for diligently raising the fact that the first reindictment failed to state a cause of action by use of the word "violations" in the critical counts. He could well have sat back and gambled upon the outcome of the trial before disclosing his "ace in the hole," which would effectively set aside his conviction and, through lapse of time, bar his subsequent reindictment and retrial.

On the other hand, it could then be plausibly argued that the first reindictment, having been seasonably brought, extended the grace period until the end of the court term following that in which it too had been found defective. If this be correct, then the first reindictment is not "no longer material" and may be disregarded, as contended by the Court of Appeals. Such holding would, of course, emasculate the statute of limitations, provided only that the first of the series of indictments be brought within the initial period.

Actually, a reading of 18 U. S. C. 3288 obviates either dilemma. The word "a" means one, a single unit. Nor does such interpretation do violence to the intent of Congress to limit the time for "any new indictment" (S. Rep. No. 1082, 76th Cong., 3d Sess., at p. 2), for the word "any" does not generically mean more than one. It is a word which contrasts with "none".

Finally, we believe attention should be directed to the fact that the question of limitations in the instant case

is not of Petitioner's making. Delay can work at least as great hardships on the defense as on the prosecution. The investigation in the instant case was commenced prior to the dates on which some of the offenses are alleged to have occurred. The Postal Inspector interviewed certain of the defendants on July 15, 1953 [Tr. 1051] and again on July 21, 1953 [Tr. 1059]. He took the records into custody on October 5, 1953 [Tr. 1021-1024]. The principal government witness on the question of intent, Stern, was interviewed and his records obtained in October, 1953 [Tr. 921, 927]. Yet the first indictment was not returned until April 9, 1958, less than a month before the earliest count and less than five months before the latest counts would have been barred by the lapse of five years.

The purpose of the statutes of limitation is to permit the government a reasonable period of time to discover the crime, and to bring its perpetrators to justice. Conversely, they are intended to protect defendants against stale claims, against which, through lapse of time, they are unable to adequately defend themselves. Finally, they are intended to bring a surcease of ancient cases from the courts' dockets.

Under the facts of the instant case, the prolonged delay from the ascertainment of the "facts" to the return of the first indictment, appears to be an abuse of process. Impinged upon this, is an interpretation of law which then permits the return of a series of three indictments, the latter two of which are brought beyond the five year period.

Conclusion.

It is earnestly urged that the situation presented is one which should merit the interference by this Honorable Court. It is therefore prayed that the Court will reconsider, and will grant certiorari as originally sought.

Respectfully submitted,

GEORGE M. BRYANT,
Attorney for Petitioner.

WALTER M. CAMPBELL,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Milton Mende, Appellant, v. United States of America, Appellee. No. 16,687. September 26, 1960. As Amended on Denial of Rehearing, Oct. 25, 1960.

Before Chambers, Jertberg and Koelsch, Circuit Judges.

Chambers, Circuit Judge.

This is a mail fraud case. The first point on appeal concerns, because of statutes of limitations, the effect of bringing in a new indictment which dropped the word "either" and changed one "or" to "and," plus the substitution of the word "allegations" for the word "violations."

Mende was one of the principals in an enterprise of soliciting mail orders for towels and perfume by means of radio advertising. Financially the business was a flop. Radio stations generally didn't get paid for their broadcast time. Essentially the basis of three successive indictments was that Mende and his associates bought the radio time from widely scattered stations without intending to pay for it.

The mailing of a letter to each of eighteen different radio stations in connection with the buying of the time as part of the overall business was the core of eighteen separate counts. Convictions were had as to counts 2, 3, 7, 10, 11, 12, 14, 15 and 18. A three year sentence concurrent as to all counts was imposed. (We need not concern ourselves with additional counts which

charged a mail fraud in connection with the failure to deliver orders to customers. Some of these counts were dismissed for failure of proof and on others the jury said: "Not guilty.")

The first indictment was returned April 9, 1958. On the counts here pertinent, the earliest mailing was on May 5, 1953, and the last on August 14, 1953. Thus, the original indictment was within the five-year period prescribed by 18 U. S. C. §3282. The first indictment was, on defendant's motion, as to all pertinent counts dismissed on July 14, 1958.

A second indictment was returned on November 5, 1958. The mailings described in the counts were the same, but one facet of the original scheme was eliminated. There was no new matter in the second indictment. And the second indictment was timely because it was within the next term and the grace period of 18 U. S. C. 3288, which reads as follews:

> "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations."

On November 19, 1958, the second indictment was dismissed on defendant's motion, and on the same day

we have a third indictment returned, identical as to the critical counts except that paragraph 4 was different in the following respects:

In the second indictment (as in the first)

> That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to either continue the broadcasts or to cancel the broadcasts of specific advertising and replace it with other advertising submitted by the defendants;

In the third indictment

> That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants, and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to continue the broadcasts and to cancel the broadcasts of specific advertising and replace it with other advertising as submitted by the defendants;

Mende's counsel, in an able brief, argues "a new indictment" in the grace statute means one indictment and one only. The trial court, in effect, ruled that any number of new indictments on the same subject matter and same defendants could be brought within the "next succeeding term" following the term in which the original indictment was dismissed for some deficiency.

Neither side finding square authority on the question, appellant marshals the cases holding that criminal statutes are construed strictly in favor of defendants. Also, he points to the possibility of repeated indictments harassing defendants after the five-year period has expired.

But it is not every proposition in criminal law that is construed strictly in favor of defendant. As a matter of simple English it is very plausible to argue that a man once indicted who has his indictment dismissed at the outset for insufficiency is subject to "double jeopardy" if he is reindicted on the same set of facts. While reindictments, particularly in a number of states, are limited by statutes, yet the law so grew up that something more than mere reindictment was required to constitute jeopardy.

We are not impressed with arguments that successive indictments during the extra term might be used to harass. Experience has shown that such an evil certainly has not been commonplace during the basic statutory period for indictment. And, we assume, if a prosecutor so lost sight of his sworn duty as to indulge in such a practice either during the period of the basic statute or the period of grace of §3288 a court would properly stop abuse.

As we construe §3288 "a new indictment" within the next term correlates such indictment under scrutiny with an indictment or indictments brought within the normal season of five years. And an intermediate indictment no longer material may be disregarded. That is to say we see no reason to apprehend a construction that statutory grace can be piled on statutory grace from term to term to the end of time. Surely one such

period is all that is contemplated. We think the underlying concept of §3288 is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment within the next term, if the earlier indictment runs into legal pitfalls. We believe the draftsman would agree with our construction as to what he intended. And we think he did say it, even though appellant's arguments is by no means frivolous.

Defendant asserts that there was insufficient evidence to take the case to the jury. We have gone over the entire record and conclude there is. On the other hand, the jury could have concluded that Mende and his associates were just bad businessmen and indifferent about their creditors. But the jury did not so conclude. Of course, the key question is intent. Though oft repeated, we must again say that intent seldom, except by admission, can be proved by direct evidence. From murder and treason down to petty mail fraud, it must be inferred.

Trial counsel for Mende was denied a continuance which he requested because of a facial affliction from which counsel was suffering. The transcript indicates that this trouble did not affect the quality of counsel's mental activity. And the same counsel secured the acquittal of a co-defendant and of Mende on many counts, including all the alleged frauds on buyers of merchandise. This sort of specification is difficult to review, but we find nothing in the record to indicate an abuse of discretion.

Finally, appellant specifies as error the admission of certain exhibits such as mailing stickers, a general ledg

er and invoices and billing statements of radio stations. The mailing stickers are of no consequence and the invoices and billing statements are of little importance. The improper admission of the ledger would be serious. However, our examination of the transcript indicates that it was sufficiently identified. We think it comes within the business record rule of 28 U. S. C. §1732(a). Appellant thinks it important that there was no substantive count in the indictment of conspiracy. We find that there was sufficient evidence of a common enterprise of the group of defendants to lay the foundation for the admission of the ledger. On the facts here, the use of Robinson v. United States, 9 Cir., 33 F. 2d 238, is more appropriate than Ilseng v. United States, 9 Cir., 120 F. 2d 823, on which appellant relies.

Judgment affirmed.

Certificate.

Comes now George M. Bryant, counsel for Milton Mende, the petitioner herein, and certifies to the Court that the Petition for Rehearing After Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is presented in good faith and not for delay and is for the purpose of calling to the attention of the court grounds available to the petitioner believed by counsel to be substantial and not previously presented to the court in the original Petition for Writ of Certiorari.

Dated February 1, 1961.

GEORGE M. BRYANT,

Counsel for Petitioner.